

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

Plaintiff,

-against-

CHARLES GONZALES,

Defendant.

USDC SDNY
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15-CR-469 (NSR)

OPINION & ORDER

NELSON S. ROMÁN, United States District Judge

After reviewing the parties' submissions, the Court denies Defendant's motion for reconsideration on the ground that it is bound by the holding in *United States v. Brown*, 52 F.3d 415, 426 (2d Cir. 1995), that robbery is a "crime of violence" within the meaning of the Armed Career Criminal Act ("ACCA"),¹ 18 U.S.C. § 924(e), "unless and until the Second Circuit itself holds otherwise." *Boone v. United States*, No. 02-CR-1185 (JMF), 2017 WL 398386, at *1 (S.D.N.Y. Jan. 30, 2017).

On December 22, 2015, the Court denied Defendant's motion and held that the enhanced sentencing provisions of 18 U.S.C. § 924(e) did apply. (*See generally* ECF No. 19.) While the Court acknowledges that the Second Circuit may find that *Johnson v. United States*, 559 U.S. 133 (2010) (defining physical force as "a degree of power [beyond] the merest touching"), overrules *Brown* and similar cases, it has not – to date – changed the law on ACCA. *See United States v. Jones*, No. 15-1518, slip op. at 14-16 (2d Cir. July 21, 2016) (holding that "forcible stealing" under

¹ The Armed Career Criminal Act (ACCA) imposes a 15-year mandatory minimum sentence on a defendant convicted of being a felon in possession of a firearm who also has three prior state or federal states convictions "for a violent felony," including "any crime punishable by imprisonment for a term exceeding one year ... that has as an element the use, attempted, use, or threatened use of physical force against the person of another." 18 U.S.C. § 942(e)(2)(B)(i).

New York law does not constitute “violent force” under *Johnson*), *vacated by* 2016 WL 5791619 (2d Cir. Oct. 3, 2016) (ordering that the appellee’s petition be held in abeyance pending the Supreme Court’s decision in *Beckles v. United States*, No. 15-8544). Therefore, the Court is required to follow Second Circuit precedent “unless and until it is overruled in a precedential opinion by the Second Circuit itself or unless and subsequent decision of the Supreme Court so undermines it that it will almost inevitably be overruled by the Second Circuit.” *Boone*, 2017 WL 398386, at *1 (S.D.N.Y. Jan. 30, 2017); *see also United States v. Diaz*, 122 F. Supp. 3d 165, 179 (S.D.N.Y. 2015). Because this Court cannot conclude that the Second Circuit or the Supreme Court is “all but certain” to overrule *Brown*, the Court must deny Defendant’s motion for reconsideration. *See Monsanto v. United States*, 348 F.3d 345, 351 (2d Cir. 2003) (noting that district courts and the Second Circuit itself are “required to follow” a Second Circuit decision, even if it is in “tension” with subsequent Supreme Court precedent, “unless and until that case is reconsidered by the [the Second Circuit] sitting in banc (or its equivalent) or is rejected by a later Supreme Court decision”); *United States v. Wong*, 40 F.3d 1347, 1373 (2d Cir. 1994) (“[U]ntil the Supreme Court rules otherwise, the district court would be obliged to follow our precedent, even if that precedent might be overturned in the near future.”).


CONCLUSION

The Court notes that in a similar case, the parties asked to stay the case pending a decision by the Second Circuit in *Jones* (in which case, this Court could immediately act on any change in the law without the need to await a remand from the Second Circuit). *See Boone v. United States*, No. 02-CR-1185 (JMF) (ECF No. 136 & 137).

Until such time, Defendant's motion for reconsideration is DENIED.

Dated: June 16, 2017
White Plains, New York

SO ORDERED:



NELSON S. ROMÁN

United States District Judge